



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE
Docket No: 5106-96
26 October 1999

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: FORMER [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments
(2) SpecAdv, Internal Med, ltr of 26 Oct 98
(3) DNCPB ltr 5420 Ser:99-40 of 28 May 99
(4) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that his naval record be corrected to show that he was retired by reason of physical disability.

2. The Board, consisting of Ms. Nofziger and Messrs. Patton and Swarens, reviewed Petitioner's allegations of error and injustice on 15 July 1999 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Although, it appears that enclosure (1) was not filed in a timely manner, it is in the interest of justice to waive the statute of limitations and review the application on its merits.

c. Petitioner served on active duty in the Marine Corps from 30 August 1978 to 29 August 1982, when he was released from active duty and transferred to the Marine Corps Reserve. A civilian medical record entry dated 20 June 1983 indicates that he had generalized lymphadenopathy, and that the problem had its onset "...perhaps one year ago when he began noticing a swelling of his groin and axilla, more so over the past year." On 10 August 1983, the Veterans Administration (VA) awarded him a disability rating of 100% for nodular lymphoma, effective from 20 June 1983, the date of when his condition was

diagnosed by a civilian physician. A 30% rating was added on 24 September 1985 because Petitioner underwent a splenectomy in May 1985 as part of the treatment for the lymphoma. His combined rating was reduced to 50% effective 1 January 1989, and increased to 100% effective 18 August 1992.

d. In correspondence attached as enclosure (3), the Board was advised by the Specialty Advisor for Internal Medicine, in effect, that Petitioner was diagnosed with poorly differentiated nodular lymphoma 11 months after he was released from active duty. Although there is no mention of enlarged lymph nodes on or before Petitioner's pre-separation physical examination report, the advisor presumes that the disease was present at that time. He recommends that Petitioner's record be corrected to show that he was unfit by reason of physical disability at the time of his release from active duty.

e. In correspondence attached as enclosure (2), the Director, Naval Council of Personnel Boards, advised the Board, in effect, that the available evidence is insufficient to establish that Petitioner's condition "...occurred while he was on active duty or that it significantly impaired his functioning while on active duty". In his opinion, the record does not establish that the condition rated by the VA in 1983 rendered Petitioner unfit by reason of physical disability at the time of his release from active duty in 1982. The Director noted that the VA rating decision of 10 August 1983 provided "Although the veteran's condition did not incur in service, it has its onset within one year and, therefore, the provisions of the presumption are applicable... ." In the Director's opinion, the fact that the condition was rated by the VA is not "sufficient cause for a medical retirement" from the Marine Corps.

CONCLUSION:

Upon review and consideration of all the evidence of record and notwithstanding the comments contained in enclosure (3), the Board concludes that Petitioner should have been retired by reason of physical disability. In this regard, it concurs with the comments of the Specialty Advisor for Internal Medicine, and it accepts Petitioner's contention to the effect that he began to experience swollen lymph nodes prior to his release from active duty. The Board concludes that Petitioner was suffering from the early stages of lymphoma prior to his release from active duty, and that had the condition been diagnosed at that time, he would have been retired by reason of physical disability.

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was permanently retired by reason of physical disability effective 30 August 1992, pursuant to 10 U.S. Code 1201, with a disability rating of 100% under VA code 7709.

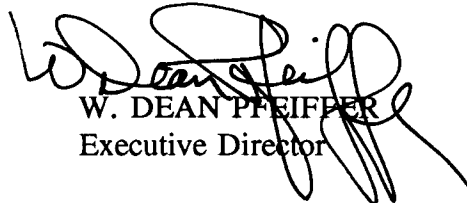
b. That a copy of this Report of Proceedings be filed in Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder


JAMES R. EXNICIOS
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.


W. DEAN PFEIFFER
Executive Director

Reviewed and approved: DEC 17 1999



CHARLES L TOMPKINS
DEPUTY ASSISTANT SECRETARY OF THE NAVY
(PERSONNEL PROGRAMS)